INDEX

PAGE

TABLE OF CASES:

Central Trust Co. vs. Clarke, 34 C.C.A. 354, 358, 92 Fed. 293, 297 13

Drug Co. vs. Byrd, 92 Fed. 29, 34 C.C.A. 351 13

Globe Refin. Co. vs. Landa Cotton Oil Co., 190 U.S. 540 ..... 2, 9

Hadley vs. Boxendale, 9 Exch. 341, 354, 356..... 13

Howard vs. Stillwell Bierce Mfg. Co., 139 U.S. 199....2, 9, 12

Iowa Mfg. Co. vs. B. F. Sturtevant Co., 162 Fed. 460, 89 C.C.A. 346 .....2, 9, 13

McDonald vs. Kansas City Bolt Co., 149 Fed. 360, 79 C.C.A. 298 .....2, 9, 12, 14

Northwestern Steam Boiler Mfg. Co. vs. Great Lakes Eng. Works, 181 Fed. 38, 104 C.C.A. 52 .....2, 9, 13

Primrose vs. Telegraph Co., 154 U.S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883 13

Railroad Co. vs. Bucki, 16 C.C.A. 42, 46; 68 Fed. 864, 868 13

Taber Lumber Co. vs. O'Neal, et al., 160 Fed. 596, 87 C.C.A. 498 .....2, 9, 13

NATURE OF CASE 3

Opinion Below 2

Questions Presented 5, 6

Reasons for Granting Writ .....9 to 14

Direct Conflict, Reason 4 .....10 to 14

Specification of Errors 7, 8

Statement of Case 6, 7

INDEX (Continued)

PAGE

Statutes:

Following sections of Chap. 143A, 1935 C.S.A. Vol. B4 ..... 3 to 5

Sec. 12, Chap. 143A, Express Warranty 3

Sec. 15, Chap. 143A, Implied Warranty 4

Sec. 15(1), Chap. 143A, Implied Warranty 4

Sec. 15(2), Chap. 143A, Implied Warranty 4

Sec. 49, Chap. 143A, Notice 4

Sec. 69(1)(b), Chap. 143A 5

Sec. 69(6), Chap. 143A, Damages 5

Sec. 69(7), Chap. 143A, Damages 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No.

S. W. PRESSEY and S. W. PRESSEY, JR., doing business as S. W. PRESSEY & SON, PETITIONERS,

vs.

BUFORD O. SCHLOTTMAN, M. E. HAFNER, M. J. O'BRIEN and JAY HUISMAN, RESPONDENTS.

No.

S. W. PRESSEY and S. W. PRESSEY, JR., doing business as S. W. PRESSEY & SON, PETITIONERS,

vs.

BUFORD O. SCHLOTTMAN, M. E. HAFNER, M. J. O'BRIEN and JAY HUISMAN, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners above named, respectfully petition the Court that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Tenth Circuit, which reverses the judgment of the United States District Court for the District of Colorado, and directs judgment to be entered against your Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the record (R. 77 to 82) and has not been officially reported. The opinion of the District Court for the District of Colorado (R. 7 to 14) appears in 96 Fed. Supp. 979.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered March 25th, 1952 (R. 77 to 82). Thereafter, on April 10, 1952, and within the time allowed therefor, a petition for rehearing (R. 85 to 102) was filed, which was denied on April 17, 1952 (R. 103). Jurisdiction of this Honorable Court is invoked under Title 28 U. S. C. 1254 (1); Motion to Stay Mandate of Court of Appeals was filed April 25th, 1952. Issuance of Mandate was stayed April 25th, 1952, pending this application for review.

The Judgment and Decree of the Court of Appeals in this case, is in direct conflict with the decisions announced by this Court (Howard vs. Stillwell and Bierce Mfg. Co., 139 U. S. 199 and Globe Refining Co. vs. Landa Cotton Oil Co., 190 U. S. 540) on the question of when general or special and consequential damages arising under a simple contract of sale of personal property may be recovered, and, is also in direct conflict with the decisions of the Circuit Court of Appeals of the old 8th Circuit in each of the following cases: Northwestern Steam Boiler Mfg. Co. vs. Great Lakes Engineering Works, (Minn. 1910), 181 Fed. 38, 104 C. C. A. 52; Iowa Mfg. Co. vs. B. F. Sturtevant Co., (Iowa 1908), 162 Fed. 460, 89 C. C. A. 346; Taber Lumber Co. vs. O'Neal et al, (Minn. 1908), 160 Fed. 596, 87 C. C. A. 498; and McDonald vs. Kansas City Bolt Co., (Colo. 1906) 149 Fed. 360, 79 C. C. A. 298, in that said judgment of the Court of Appeals in this case applies the rule of special or consequential damages to a simple contract of sale where there

were no special circumstances known to the seller, and the object or purpose for which the personal property was purchased by the buyer was unknown to the seller, and special damages could not have been contemplated by the parties.

NATURE OF CASE

This is an action for damages for breach of contract and express warranty in the sale of 17 pound 6⅝ inch used oil well casing, subject to inspection by the buyer (Respondent) at sellers' (Petitioners) place of business (where buyer lived in one state and seller in another, the business of the buyer was unknown to the seller, and the parties were total strangers), and there were no special circumstances made known to the sellers (Petitioners). The sellers (Petitioners) unknowingly delivered 13 pound 6⅝ inch casing, believing it to be 17 pound casing (R. 57-58; R. 74).

Casing was not sold for "consumption and use" and the Trial Court expressly found that the seller did not know, and was not advised of the purpose for which the property and goods were bought (R. 9, Find. VII), and, that there was no evidence introduced as to the difference between the cost of 13 pound used casing and 17 pound used casing at the time of delivery, (R. 10, XII), and therefore enter judgment for the Plaintiff for $1.00 and costs (R. 14). The Court of Appeals reversed this judgment with instructions to enter judgment against the Petitioners for $13,574.81 (R. 82).

STATUTES INVOLVED

The pertinent provisions of the Colorado Uniform Sales Act, Vol. 4B, 1935 Colorado Statutes Annotated, Chapter 143A are Sections 12, 15, 15(1), 15(2), 49, 69(1)(b), 69(6), 69(7).

Sec. 12, Vol. 4B, 1935 C. S. A., Chap. 143A: DEFINITION OF EXPRESS WARRANTY. Any affirmation of

fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Sec. 15, Vol. 4B, 1935 C. S. A., Chap. 143A: IMPLIED WARRANTIES OF QUALITY: Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

Sec. 49, Vol. 4B, 1935 C. S. A., Chap. 143A: ACCEPTANCE DOES NOT BAR ACTION FOR DAMAGES: In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after the acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Sec. 69, (1)(b), Vol. 4B, 1935 C. S. A., Chap. 143A: REMEDIES FOR BREACH OF WARRANTY: Where there is a breach of warranty by the seller, the buyer may, at his election—Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.

Sec. 69 (2). When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

Sec. 69 (6). The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

Sec. 69 (7). In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

QUESTIONS PRESENTED

1. Are the Petitioners, who are dealers in used oil and water well equipment, at Pueblo, Colorado, liable to the Respondents of Newell, South Dakota, for the expenses incident to the drilling of an oil well, etc., as "a loss suffered directly or naturally resulting in the ordinary course of events from a breach of warranty," where 17 pound 6⅝ inch used oil well casing was purchased, subject to inspection at Petitioners' place of business in Colorado by the Respondent Schlottman, who was a stranger to the Petitioners, and whose business was unknown to the Petitioners, on which contract the Petitioners delivered 13 pound 6⅝ inch used casing believing it to be 17 pound casing, which casing was transported to South Dakota by the Respondents, and used in the drilling of a well, and the casing collapsed, resulting in the loss of the well, when the Petitioners

were not advised of any special circumstances of any character, and did not know the purpose for which the casing was purchased by the Respondent Schlottman.

2. Does the phrase, to-wit: "Loss directly and naturally resulting in the ordinary course of events, from the breach of warranty" contained in Section 69, (6) C. S. A., Chap. 143A, Vol. B4, contemplate or include any damage or loss other than general damages, (the difference between the value of the goods furnished and the value of the goods the vendor agrees to furnish), where there are no special circumstances known to the sellers surrounding the sale, and where the sellers (Petitioners) did not know the purpose for which the buyer (Respondent) was purchasing the casing.

3. Were the Respondents guilty, as a matter of law, of failing to give the Petitioners notice of the breach of warranty within a reasonable time after the Respondents had knowledge of such breach under Sec. 49, Page 143A, 1935 C. S. A., Vol. B4, where the Respondents purchased 17 pound 6⅝ inch used oil well casing from the Petitioners in Colorado on April 23, 1948, and transported said casing to South Dakota, and used it in drilling an oil well where the casing collapsed because it was 13 pound casing, and, when the Respondents abandoned the well July 15, 1948, at which time the Respondents had definite knowledge of the breach of warranty, and the Respondents failed to notify the Petitioners until September 13, 1948, 60 days there after, and tendered no excuse or reason for their delay in notifying the Petitioners of the breach of warranty (R. 9, IX).

STATEMENT OF CASE

B. O. Schlottman, of Newell, South Dakota, one of the Respondents entered into a contract by phone calls, letters and telegrams with the Petitioners of Pueblo, Colorado, on March 30, 1948, for the purchase of 2,000 feet of 17 pound 6⅝ inch casing, subject to inspection by Schlottman in the yards of the Petitioners, at Pueblo, Colorado, and on April

23, 1948, Schlottman went to Pueblo and inspected the casing and purchased 2,040 feet (R. 7-8 Find. III). That the Petitioners were not aware of the purpose the Respondent Schlottman had in purchasing the casing (R. 9 Find. VII). The Petitioners unknowingly delivered 13 pound casing believing it to be 17 pound (R. 58). (R. 8 Find. V). The Respondents took the casing to Newell, South Dakota, and used it in the drilling of a well to a depth of 1,407 feet when the casing collapsed and the Respondents abandoned the lieving it to be 17 pound (R. 58), (R. 8 Find V). The Respondents learned on July 15, 1948, that the casing was 13 pound instead of 17 pound, and did not notify the Petitioners of that fact until September 13, 1948 (R. 9, Find. VIII and IX). The Respondents demanded damages for the expenses of drilling the well, etc., in the sum of $13,-754.81 (R. 9-10, Find. X). There was no evidence as to the difference between the cost of 13 pound and 17 pound used casing on April 23, 1948 (R. 10, Find. XII). Trial Court held the failure to deliver 17 pound pipe was a breach of contract, and that Respondents were liable for the direct and approximate damages thereof (R. 11, Conc. V). Trial Court also found that there was not a scintilla of evidence of an implied warranty and denied special damages (R. 13, Conc. VIII). Trial Court entered judgment for $1.00 for damages and costs (R. 13, Conc. X), (R. 14). Court of Appeals reversed the judgment of Trial Court and directed entry of judgment against Petitioners for $13,754.81 (R. 77 to 82).

SPECIFICATION OF ERRORS TO BE URGED

THE COURT OF APPEALS ERRED:

1. In reversing the judgment of District Court for $1.00 and costs (R. 13, 14), and directing the entry of judgment against the Petitioners for $13,754.81 (R. 77 to 82).

2. In holding that the Petitioners are liable for the expenses of drilling of an oil well as "a loss directly and

naturally resulting in the ordinary cause of events from the breach of a warranty" of the weight of casing, where the buyer and his business was unknown to the Petitioners, and where there were no special circumstances made known to the Petitioners, and the Petitioners did not know the purpose for which the Respondents purchased the casing.

3. In assuming that the casing in this case was sold for "consumption and use," and grounding its judgment upon that assumption, in face of the specific finding, that the defendants (Petitioners) did not know the purpose for which the casing was bought.

4. In holding that the Trial Court found that the loss of plaintiff's (Respondents) well was the natural result of the defendants breach of their contract to deliver 17 pound casing.

5. In holding that the Petitioners, under all of the circumstances of this case the Petitioners were bound to foresee that the casing which they sold to the Respondents would be placed in a well where 17 pound oil well casing was customarily used, and that the collapse of the 13 pound casing was the natural result of the breach of express warranty to furnish 17 pound casing.

6. In applying the rule of special or consequential damages for the expense of drilling an oil well, where it was expressly found by the Trial Court that the Petitioners did not know the purpose for which the casing was purchased.

7. In failing to hold, as a matter of law, that the Respondents failed to notify the Petitioners of the breach of warranty within a reasonable time after the Respondents knew of the breach and in failing to direct the dismissal of the action upon that ground, under Sec. 49, Chap. 143A, 1935 C. S. A., Vol. B4.

REASONS FOR GRANTING WRIT

1. The decision of the Court below in the instant case is in direct conflict with the decisions of this Court in the cases of Howard vs. Stillwell and Bierce Mfg. Co., 139 U. S. 199, and Globe Refining Co. vs. Landa Cotton Oil Co., 190 U. S. 540 and, is also in conflict with the decisions of the Circuit Court of Appeals of the old 8th Circuit in each of the following cases: Northwestern Steam Boiler & Mfg. Co. vs. Great Lakes Engineering Works (Minn. 1910) 181 Fed. 38, 104 C. C. A. 52; Iowa Mfg. Co. vs. B. F. Sturtevant Co., (Iowa 1908) 162 Fed. 460, 89 C. C. A. 346, Taber Lumber Co. vs. O'Neal et al, (Minn. 1908) 160 Fed. 596, 87 C. C. A. 498, and McDonald vs. Kansas City Bolt Co., (Colo. 1906) 149 Fed. 360, 79 C. C. A. 298, in that the above cases hold that a vendor is not liable for special damages for breach of a contract for sale of goods, where there are no special circumstances known or made known to the vendor at the time of the sale, whereas, the judgment of the Court of Appeals in the instant case holds the Petitioners liable for special and consequential damages arising out of a simple contract sale of goods, where there were no special circumstances surrounding the sale known, or made known to the Petitioners at the time of the sale, and the Petitioners did not know the purpose for which the respondents were buying the casing.

2. Clearly, the questions presented are of great importance to business in general, as the decision of the Court of Appeals in the instant case has the following effect on the rule of general and special or consequential damages applicable to contracts of sales, to-wit:

a. It holds all vendors of goods sold on simple contract for special or consequential damages resulting from special circumstances, regardless of whether such special circumstances were known to the vendors at the time of the sale, and which special or consequential damages could

not have been contemplated by the vendors at the time of the sale, under the facts of this case.

b. It interprets the phrase "loss directly and naturally in the ordinary cause of events" so as to include all damages arising out of the use of an article, when such intended use of the article by the buyer was unknown to the vendor at the time of the sale.

c. It does away with the distinction between general and consequential damages for breach of contracts of sale, and the long recognized rule that special or consequential damages cannot be recovered, unless the facts upon which they depend are known to the vendor at the time of the sale.

d. It will eliminate the rule of general damages arising from breach of practically all simple contracts, and put in place thereof a rule of special or consequential damages based upon a presumption drawn solely from the character of the goods sold.

e. If the decision of the Court of Appeals in the instant case is permitted to stand, it will change the law applicable to general and special or consequential damages arising from the sale of goods, that has existed ever since the case of Hadley vs. Baxendale, 9 Exch. 341, decided in England, which rule of law has been adopted by practically every state and the Federal Courts.

3. The judgment of the Court of Appeals in the instant case places a severe and unjust burden and obligation upon the Petitioners, without any warrant of law, which may result in their financial disaster, as they are small merchants with limited capital.

4. The direct conflict between the cases above cited of this Court and the Circuit Court of Appeals of the old 8th Circuit with the decision of the lower Court in the instant case is demonstrated by the following:

The Trial Court expressly found that:

"• • • In fact, the evidence does not disclose the defendants (Petitioners) were aware of the purpose plaintiffs (Respondents) had in purchasing the goods." (R. 9, Find. VII).

The opinion of the Court of Appeals of (R. 79) recites the above findings with apparent approval, which demonstrates that the casing was not sold for "consumption and use" or for any special purpose. The Court of Appeals proceeds to base its judgment on "consumption and use" disregarding the above findings, as follows:

"The seller is bound to foresee injuries which follow a breach of contract in the usual course of events and it is not necessary for the buyer to show specifically that the seller had knowledge of the facts. When the goods are sold for consumption and use, the seller is then held to foresee and anticipate injuries which may result from breach of the contract of sale if the goods are put to their customarily use." (R. 80).

The Court of Appeals further states: "The Court held that the loss of plaintiffs' well was the natural result of the defendants' (Petitioners) breach of their contract to deliver 17 pound casing" (R. 80), which statement cannot be found in the Trial Court's findings and judgment.

The Court of Appeals further states: "The Plaintiffs (Respondents) did not intend to or use the casing for any other purpose than that for which it was manufactured or for which it was customarily used," (R. 80), which fact was unknown to the Petitioners as above shown (R. 9, Find. VII).

The Court of Appeals then follows with the statement in the same paragraph:

"So there were no special circumstances present." (R. 80).

After some further observations the Court of Appeals then at (R. 81) erroneously holds:

> "Under all the circumstances of this case, the defendants (petitioners) were bound to foresee that the casing which they sold to the plaintiffs (respondents) would be placed in an oil well where 17 pound casing was customarily used, and that the collapse of the 13 pound casing was the natural result of the breach of the express warranty to furnish 17 pound casing."

The foregoing is in conflict with the following cases:

This Court in Howard v. Stillwell & Bierce M'f'g. Co., 139 U. S. 199 at 207, states the rule to be:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The Court then states:

> "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The Circuit Court of Appeals of the 8th Circuit in the case of McDonald v. Kansas City Bolt & Nut Co., 149 Federal 360, 79 C. C. A. 298 at Page 365, states the rule to be:

"In the absence of proof aliunde of knowledge by the defaulting party at the time an ordinary contract of sale is made of special circumstances which make other damages the natural and probable effect of its breach, the difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of the damages which the vendee may recover for a failure to furnish articles of the agreed character, because this is the only damage implied by the contract, the only damage that would naturally flow from its breach in the usual course of events. Central Trust Co. v. Clark, 34 C. C. A. 354, 358, 92 Fed. 293, 297; Drug Co. v. Byrd, 92 Fed. 290, 34 C. C. A. 351; Railroad Co. v. Bucki, 16 C. C. A. 42, 46, 68 Fed. 864, 868; Hadley v. Baxendale, 9 Exch. 341, 354, 356; Primrose v. Telegraph Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883."

The following cases of the old Circuit Court of Appeals, 8th Cir., declare the above rule of law, which is in direct conflict with the decision of the lower court in the instant case:

"Northwestern Steam Boiler Mfg. Co. v. Great Lakes Engineering Works, 181 Fed. 38, 104 C. C. A. 52; Iowa Mfg. Co. v. B. F. Sturtevant Co., 162 Fed. 460, 89 C. C. A. 346; Taber Lumber Co. v. O'Neal et al, 160 Fed. 596; 87 C. C. A. 498.

5. The rule of damages announced by the Court of Appeals in the instant case applying special and consequential damages to a simple contract of sale, where there were no special circumstances surrounding the sale known to the seller at the time of the sale, is directly opposed to, and in conflict with all of the decisions of the Federal and State Courts and creates an unwarranted uncertainty in the law of damages deterimental to all future business transactions.

6. If it is contended that the judgment of the Court

of Appeals in the instant case holds, that the damages, to-wit: "loss suffered in drilling a well," are general, and not special damages, then the decision is likewise in direct conflict with the above cited cases of this Court, and the Circuit Court of Appeals of the old 8th Circuit, which hold general damages to be:

> "The difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of the damages which the vendor may recover for a failure to furnish articles of the agreed character because this is the only damage implied by the contract, the only damage that would naturally flow from its breach in the usual course of events." McDonald vs. Kansas City Bolt Co. Super.

Therefore, the decision of the Court of Appeals, if so construed, would completely change the law as to what constitutes general and special or consequential damages, under a contract of sale of goods, with like effect as hereinbefore called to the court's attention.

7. The general and far reaching effect of the decision of the Lower Court in the instant case, upon business contracts generally, is to change the present rule of damages, and place upon business, merchants, etc. in their every day transactions, whether they are for the sale of goods, construction contracts, building contracts, etc., of knowing what use or purpose the buyer or contractor intends to make of the goods or do with the object of the contract, and to make provisions against liability therefor, or of taking the chance of being held liable upon the ground of a presumed use or intention of the contracting party, whether or not such use or object is known to the vendor, contractors, etc., even though there is nothing in the negotiations that would cause the vendor, contractor, etc., to contemplate such liability or damage in case of breach.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EMMETT THURMON,

FRENCH L. TAYLOR,
Union National Bank Bldg.,
104 Broadway,
Denver 9, Colorado,
Counsel for Petitioners.